No. 17-130

IN THE
Supreme Court of the United States

RAYMOND J. LUCIA
AND RAYMOND J. LUCIA COMPANIES, INC.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are named in the caption.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Raymond J. Lucia Companies, Inc. has no parent corporation, and no publicly held company holds 10% or more of its stock.

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BRIEF FOR PETITIONERS

Petitioners Raymond J. Lucia and Raymond J. Lucia Companies, Inc. (collectively, "Lucia") respectfully submit that the judgment below should be reversed.

OPINIONS BELOW

The *per curiam* order of the en banc court of appeals, Pet. App. 1a-2a, is available at 868 F.3d 1021. The panel's opinion, Pet. App. 3a-36a, is reported at 832 F.3d 277. The opinion and order of the Commission, Pet. App. 37a-109a, are available at Exchange Act Release No. 73,857, 2015 WL 5172953; an interim remand order, Pet. App. 238a-243a, is unreported. The relevant initial decision of the administrative law judge, Pet. App. 115a-237a, is available at Initial Decision Release No. 495, 2013 WL 3379719.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2017. Pet. App. 1a. The petition for a writ of certiorari was filed on July 21, 2017 and was granted on January 12, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Appointments Clause as well as pertinent statutory and regulatory provisions are reproduced in the Petition Appendix at 247a-294a.

STATEMENT

Administrative law judges of the Securities and Exchange Commission preside over trial-like adversarial hearings, during which they take testimony, rule on the admissibility of evidence, and enforce compliance with their orders. This Court has ruled that federal adjudicators who exercise substantially similar powers are "'Officers of the United States'" within the meaning of the Appointments Clause. *Freytag* v. *Comm'r*, 501 U.S. 868, 881-82 (1991); *see also Edmond* v. *United States*, 520 U.S. 651, 662, 665 (1997). The question presented is whether SEC ALJs are also Officers.

1. Long before the advent of the modern administrative state, the Framers understood that curbing abuses of executive power requires carefully cabining the prerogative to *appoint* those who wield it. *Edmond*, 520 U.S. at 659-60. In prescribing the means of appointing any "Office[r] of the United States," U.S. Const. art. II, § 2, cl. 2, the Appointments Clause "preserves ... the Constitution's structural integrity" by ensuring that officials who make and receive appointments remain, directly or indirectly, "accountable to political force and the will of the people." *Freytag*, 501 U.S. at 878, 884; *see also Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

a. Congress has charged the SEC with executing and enforcing the federal securities laws, 15 U.S.C. § 78d(a), including the Investment Advisers Act of 1940, *id.* § 80b-9. Congress authorized the Commission to "delegate ... any of its functions," except rulemaking, to "administrative law judge[s]." *Id.* § 78d-1(a). When the Commission initiates an enforcement action, it can either sue in federal court or commence an administrative proceeding. *See id.* §§ 78u, 78u-2,

78v. Where the Commission elects the latter course, an ALJ normally presides over the proceeding. *See* 17 C.F.R. § 201.110.

In authorizing ALJs to resolve contested matters "on the record" pursuant to the Administrative Procedure Act, 5 U.S.C. § 557(c)(3)(A), "Congress intended to make [such officials] 'a special class of semi-independent'" yet still "'subordinate hearing officers,'" *Ramspeck* v. *Fed. Trial Exam'rs Conference*, 345 U.S. 128, 132 (1953) (citation omitted). Congress repeatedly referred to SEC ALJs as "officers" in the securities laws, 15 U.S.C. §§ 77u, 78v, 80a-40, 80b-12, and to their precursors as "officers" or "subordinate officers" in the APA, Pub. L. No. 79-404, 60 Stat. 237, 241-42 (1946). Congress also set forth SEC ALJs' duties and salary by law, *see* 5 U.S.C. §§ 556-57 (duties), 5372(b) (salary); and prescribed that the "*agency* shall appoint [its] administrative law judges," *id.* § 3105 (emphasis added)—an obligation the Commission has failed to discharge. ALJs are removable "for good cause, as established and determined by the Merit Systems Protection Board." *Id.* § 7521(a).

b. Since the Dodd-Frank Act of 2010 expanded the Commission's administrative enforcement authority, the Commission has brought more than 80% of its enforcement proceedings in its in-house tribunal, where it has won over 90% of the time. *See* Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015), http://tinyurl.com/o9vsozr (all Internet sites last visited February 20, 2018).

The Commission has characterized its ALJs as "hearing officer[s]" and delegated to those "officer[s] ... the authority to do all things necessary and appropriate to discharge" their duties. 17 C.F.R. § 201.111. That authority is extensive and includes the powers

to oversee hearings and discovery, rule on motions (including for summary disposition), enter default judgments, and impose or modify sanctions. *See generally ibid.* (non-exhaustive list of ALJs' powers); *see also id.* §§ 201.155 (default), .180 (sanctions), .230 (document production), .232-.234 (subpoenas and depositions), .250 (summary disposition), .320-.326 (evidence). As the Commission emphasized in this proceeding, ALJs play a "vital role" in the agency's decision-making process, Pet. App. 241a, by ruling on the admissibility of evidence, taking testimony, and making credibility findings.

At the conclusion of an administrative hearing, SEC ALJs enter an "initial decision," 17 C.F.R. § 201.360(a)(1), that can and almost always does "become final" without any Commission review, *id.* § 201.360(d)(2). Although the Commission "retain[s] a discretionary right to review" any "action" by an ALJ, whether *sua sponte* or upon a petition for review, 15 U.S.C. § 78d-1(b), "[i]f the right to exercise such review is declined" or is not timely sought, the ALJ's action is "deemed the action of the Commission," *id.* § 78d-1(c); 17 C.F.R. § 201.360(d)(2).

SEC ALJs are not appointed in a manner that complies with the Appointments Clause. Pet. App. 9a-10a. Although the Commission acting as a body is considered a "Head of Department" under the Clause, *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 512-13 (2010), the Commission itself does not appoint its ALJs. Rather, SEC ALJs are selected by SEC staff from a list of three candidates provided by the Office of Personnel Management. Pet. App. 295a-297a.

2. Petitioner Raymond J. Lucia, formerly the sole owner of petitioner Raymond J. Lucia Companies, Inc., is an investment professional who—until this

proceeding—had an unblemished record spanning nearly forty years. *See* Pet. App. 34a, 119a-120a, 233a. In free seminars for potential clients, Lucia promoted a retirement strategy colorfully named "Buckets of Money" ("BOM"), which advocated a diversified portfolio from which, in retirement, investors would liquidate lower-risk investments first to give riskier investments time to grow. *Id.* 23a, 127a-129a.

Lucia used a slideshow that compared fictional investors following his BOM strategy with investors following other strategies in hypothetical scenarios. Pet. App. 23a, 130a-132a. Two hypotheticals, which the slides described as "backtests," were based partly on historical periods—using actual data for certain stock returns, but employing assumptions regarding inflation and rates of return on real-estate and other investments. *Id.* 46a-47a.

Lucia stressed that these examples were hypothetical. Slides illustrating the examples were emblazoned: "This is a hypothetical illustration and is not representative of an actual investment." Pet. App. 43a n.10. And slides outlining the BOM strategy noted that "[r]ates of return are hypothetical in nature and are for illustrative purposes only." *Id.* 45a n.14, 47a n.19. Mr. Lucia "'expressly informed seminar attendees that he was using *hypothetical, pretend, assumed* rates of return.'" *Id.* 76a; *see, e.g.*, *id.* 47a-48a.

Before Lucia's slideshow was publicly distributed, it was reviewed by broker-dealers registered with the Financial Industry Regulatory Authority, who repeatedly approved the slides and raised no concerns that they were misleading. Pet. App. 84a; *see* FINRA R. 3110 ("Supervision"). In 2003, the Commission's examination staff reviewed a similar version of Lucia's

slideshow and raised no concerns that it was misleading. Pet. App. 84a.

No securities were offered or sold at Lucia's seminars. Pet. App. 39a n.2, 82a. Instead, seminar attendees interested in a "complimentary financial planning consultation" could complete a response card requesting to be contacted. *Id.* 41a n.6. About 50,000 people attended Lucia's seminars over the years, but not one lodged a complaint that the slideshow was misleading. *Id.* 129a, 206a.

3. In 2012, the Commission charged Lucia with violating the antifraud provisions of the Investment Advisers Act and SEC rules. Pet. App. 7a-8a. The allegations focused on two presentation slides—out of a 126-page slideshow, *id.* 130a—that used the word "backtest" to describe the hypothetical comparisons. *Id.* 66a. Although the term "backtest" was not defined in any law or regulation, and had not been construed in any judicial or administrative proceeding, the Enforcement Division insisted that a "backtest" must be based *exclusively* on historical data, and that Lucia's use of the term "backtest" to describe hypotheticals that used assumptions was therefore misleading even though the assumptions themselves were disclosed. C.A.D.C. JA30.

The Commission could have sued Lucia in federal court, *see* 15 U.S.C. § 78d-1, but it chose not to. Instead, the Commission assigned the proceeding to ALJ Cameron Elliot, who would not rule against the Enforcement Division once in his first fifty cases (including this one). *See* Sarah N. Lynch, *SEC Judge Who Took on the "Big Four" Known for Bold Moves*, Reuters (Feb. 3, 2014), http://tinyurl.com/hlu76fl. After Judge Elliot issued an initial decision, the Commission remanded for further factual findings, Pet.

App. 239a, because such findings were "a matter of considerable importance" to the Commission, *id.* 241a.

Judge Elliot shaped the record by crediting the testimony of two seminar audience members, *see* Pet. App. 160a-161a, 193a, which was essential to his findings that Lucia had made materially false statements, *see id.* 169a, 190a, 191a, 211a. One of these witnesses had previously sued Lucia, but then "admitted in writing that his claims against Lucia were false." *Id.* 193a. Judge Elliot credited this person's testimony, even while excluding evidence showing that he had made "knowingly false sworn statements." *Ibid.* The other witness had "holes in his memory" and had "complained to multiple people" about Lucia (though not about the BOM seminar), but Judge Elliot found that this only "bolster[ed] his overall credibility." *Id.* 194a. Meanwhile, Judge Elliot did not mention that other witnesses would have testified on behalf of Lucia, but the Enforcement Division had "intimidated" them into withdrawing by serving them with a late-night subpoena to produce—within less than one week—all financial documents, in every format, from any source, over a five-year period. Letter from James and Judy Constance to Administrative Law Judge Elliot, Admin. Proc. No. 3-15006, Doc. No. 38 (Dec. 9, 2012).

Even though SEC ALJs are not authorized to engage in rulemaking, *see* 15 U.S.C. § 78d-1(a), Judge Elliot also concluded that Lucia's use of the word "backtest" was misleading because the slideshow did not "mee[t] the definition of 'backtest' that *I have adopted*," Pet. App. 171a (emphasis added). Lucia's employees testified, and financial industry pamphlets confirmed, that "backtests" can be based partly on assumptions. *See id.* 163a. But Judge Elliot accepted

the Enforcement Division's unprecedented and unsupported position, ruling that a "backtest" can only describe hypotheticals based exclusively on historical data. *Id.* 196a-197a.

Judge Elliot further found, among other things, that the disclosed use of an assumed inflation rate was misleading, Pet. App. 197a, even though attendees knew that the assumed rate "did not reflect" actual rates, *id.* 178a, and the BOM strategy undisputedly would have outperformed the comparison portfolios using *either* rate. Judge Elliot also concluded that Lucia's statement that "the BOM strategy is purely a 'withdrawal strategy'" was "knowingly false," *id.* 205a—which does not make sense because the order instituting proceedings itself had described the BOM strategy as a withdrawal strategy, *see* C.A.D.C. JA4. Moreover, no securities were ever offered or sold at the seminars, and indeed there was no allegation that Lucia had engaged in fraudulent securities trading.

There was no evidence, much less a finding, that the conduct at issue caused *any* investor losses. *See* Pet. App. 101a. Nevertheless, Judge Elliot imposed monetary sanctions based on "the substantial financial success" Lucia and his company had purportedly "enjoyed at their clients' expense." *Id.* 231a. In addition, Judge Elliot barred Lucia from working as an investment adviser or associating with broker-dealers (including his own son) for the rest of his life, *id.* 225a-233a, in keeping with his established practice of "never giv[ing] less than a permanent bar" as a sanction against an investment adviser in a contested proceeding, Transcript at 103:20, *In re W. Pac. Capital Mgmt.*, Admin. Proc. No. 3-14619 (Apr. 2, 2012). As a result of this proceeding, Ray Lucia is unemployable

in his lifelong profession and on the verge of bankruptcy.

4. Lucia timely sought Commission review, challenging the initial decision on the merits and arguing that Judge Elliot held office in violation of the Appointments Clause. Pet. App. 38a-40a. The Commission granted discretionary review and—by a 3-2 vote—affirmed in relevant part. *Id.* 39a-40a, 110a.

On the merits, the Commission majority sustained Judge Elliot's conclusion that the presentations were misleading because a "backtest" must use "historical data" whereas Lucia's hypotheticals used disclosed assumptions in addition to historical data. Pet. App. 66a-69a. Relying on *Landry* v. *FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), the Commission majority further concluded that SEC ALJs are "not subject to the requirements of the Appointments Clause," Pet. App. 86a, because "it is 'the Commission's issuance of a finality order' that makes [an ALJ's] decision effective and final," *id.* 90a.

In the SEC's only written dissent of 2015, Commissioners Gallagher and Piwowar sharply disagreed on the merits. *See* Pet. App. 110a-114a. The dissenters explained that the majority had "create[d] from whole cloth specific requirements for advertisements that include the word 'backtest,'" and then deemed it misleading "if a backtest fails to use actual historical rates—even if the slideshow presentation specifically discloses the use of assumed rates for certain components." *Id.* 111a. The dissenters also noted that Article III courts should decide the Appointments Clause issue. *Id.* 113a.

5. A three-judge panel of the D.C. Circuit denied Lucia's timely petition for review. Pet. App. 4a. In

addition to sustaining the liability and sanctions orders on the merits, *id.* 21a-36a, the panel rejected the Appointments Clause challenge.

The panel stated that, under the D.C. Circuit's 2-1 decision in *Landry*, the constitutional "analysis begins, and ends," with "whether Commission ALJs issue final decisions of the Commission." Pet. App. 13a. According to the panel, the Commission's power of discretionary review was sufficient to render its ALJs mere employees. *Id.* 13a-16a. Lucia argued that *Landry*'s approach was incompatible with this Court's decisions in *Freytag* and *Edmond*, but the panel summarily responded that "this court has rejected that argument, and *Landry* is the law of the circuit." *Id.* 13a.

The Tenth Circuit subsequently ruled that SEC ALJs *are* Officers, *Bandimere* v. *SEC*, 844 F.3d 1168, 1179, 1188 (10th Cir. 2016), expressly disagreeing with the D.C. Circuit's reasoning in this case and in *Landry*. In the Tenth Circuit's view, the D.C. Circuit "place[d] undue weight on final decision-making authority." *Id.* at 1182.

The D.C. Circuit granted rehearing en banc, Pet. App. 245, but—after full briefing and argument—issued a brief *per curiam* order stating that the petition for review was denied by an equally divided court, *id.* 1a-2a. That order left the panel decision intact. *See* D.C. Cir. R. 35(d).

6. In response to Lucia's petition for a writ of certiorari, the Solicitor General acknowledged that SEC ALJs exercise "'significant authority pursuant to the laws of the United States,'" and are therefore Officers. U.S. Cert. Br. 10, 12 (quoting *Buckley*, 424 U.S. at 126). This Court granted certiorari and appointed an *amicus curiae* to defend the judgment below.

SUMMARY OF ARGUMENT

The Appointments Clause prescribes the means of appointing every "Office[r] of the United States." U.S. Const. art. II, § 2, cl. 2. SEC ALJs are Officers because they exercise significant authority under federal law, yet they indisputably are not appointed in conformity with the Clause. Because Lucia was tried before an unconstitutional tribunal, a meaningful remedy is required.

I. SEC ALJs, who preside over adversarial enforcement proceedings, easily fit the Appointments Clause's expansive conception of "Officer."

A. The text and purpose of the Appointments Clause confirm that the category of "Officers" is intentionally broad. *Any* official whose position is "'established by Law'" and who exercises "significant authority" under federal law is an Officer. *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam) (citation omitted). Applying this definition, this Court has consistently held that federal adjudicators who preside over adversarial enforcement proceedings are Officers.

B. SEC ALJs are Officers because their position is established by federal law, *see, e.g.*, 5 U.S.C. §§ 556-57, and they preside over adversarial enforcement proceedings. SEC ALJs perform all of the same discretionary functions that this Court found "significant" in *Freytag* v. *Commissioner*, 501 U.S. 868, 881-82 (1991)—and then some. Under a straightforward application of *Freytag*, SEC ALJs are Officers.

C. Relying on D.C. Circuit precedent, the panel below concluded that SEC ALJs are not Officers because their decisions are subject to discretionary review by the Commission. *This* Court's precedents make clear, however, that "authority to enter a final

decision" is not essential to Officer status, *Freytag*, 501 U.S. at 881; indeed, authority to enter decisions subject to discretionary review is one of the hallmarks of inferior (as contrasted with principal) Officers, *Edmond* v. *United States*, 520 U.S. 651, 665 (1997).

D. Congress provided, in both the securities laws and the APA, that ALJs are "officers." That designation is all but dispositive of their status under the Appointments Clause. *See United States* v. *Germaine*, 99 U.S. 508, 510 (1879). This statutory scheme also destroys any suggestion that ALJs should be considered employees, rather than Officers, to preserve "adjudicatory independence." Congress authorized SEC enforcement actions to proceed either in Article III courts, which are independent of the Commission, or before SEC ALJs, which are not. By pretending that its ALJs are "independent" adjudicators, the SEC evades the "public accountability" that the Appointments Clause requires. *Edmond*, 520 U.S. at 660.

II. The constitutional violation in this case requires an appropriate and commensurate remedy.

A. Lucia is constitutionally entitled to, at minimum, a new "hearing before a properly appointed" adjudicator. *Ryder* v. *United States*, 515 U.S. 177, 188 (1995); *see also United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 (1952). An entirely new proceeding is required because a defect in "the appointment" of the adjudicator "goes to the validity" of the underlying proceeding, *Freytag*, 501 U.S. at 879, and is a structural error that "affect[s] the ... whole adjudicatory framework," *Williams* v. *Pennsylvania*, 136 S. Ct. 1899, 1910 (2016).

B. The Commission has already announced that SEC ALJs may "ratify" decisions made when they had

no constitutional authority to act. That is a misuse of ratification principles, *see FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98-99 (1994); indeed, ratification in this context is indistinguishable from the "*de facto* officer" doctrine rejected by this Court in *Ryder*, 515 U.S. at 179. To send a clear message that the Appointments Clause is no mere "matter of 'etiquette or protocol,'" *Edmond*, 520 U.S. at 659 (citation omitted), and to avoid another trip up the appellate ladder, this Court should order outright dismissal of this proceeding.

ARGUMENT

In recent years, the Securities and Exchange Commission has shifted more than 80% of its enforcement proceedings to its in-house tribunal, *see* Jean Eaglesham, *SEC Wins With In-House Judges* ("*SEC Wins*"), Wall St. J. (May 6, 2015), http://tinyurl.com/o9vsozr, where its administrative law judges preside over adversarial proceedings and issue decisions that almost always become the Commission's final word. The Enforcement Division has fared well in this captive forum, winning over 90% of the time. *Ibid.* Contemporaneously with this case, the Enforcement Division won an astonishing 219 cases in a row, *see* Ryan Jones, *The Fight over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. Rev. 507, 509 (2015), including 50 of its first 50 cases tried before ALJ Elliot, who conducted this proceeding, *see* Sarah N. Lynch, *SEC Judge Who Took on the "Big Four" Known for Bold Moves* ("*SEC Judge*"), Reuters (Feb. 3, 2014), http://tinyurl.com/hlu76fl.

The Commission's administrative tribunal violates a "significant structural safeguar[d] of the constitutional scheme." *Edmond* v. *United States*,

520 U.S. 651, 659 (1997). The Appointments Clause of Article II prescribes the means for appointing any "Office[r] of the United States." U.S. Const. art. II, § 2, cl. 2. As the Solicitor General now concedes, SEC ALJs are Officers because they exercise significant authority under federal law. U.S. Cert. Br. 14-15. The Commission, however, has refused to appoint its ALJs in a manner that comports with the Appointments Clause. Pet. App. 87a. Indeed, the Commission promotes its ALJs as "independent" adjudicators even though Congress made them subordinates of the Commission who carry out executive policy.

Granting the petition for review in this proceeding, and imposing a meaningful remedy for the Commission's unrepentant violation of Lucia's constitutional rights, will be important steps toward bringing our Executive Branch back in line with the Framers' design.

I. SEC ALJs Are Officers Of The United States

The Framers considered "'the power of appointment to offices'" to be "'the most insidious and powerful weapon of eighteenth century despotism.'" *Freytag* v. *Comm'r*, 501 U.S. 868, 883 (1991) (citation omitted). To prevent the "'manipulation of official appointments,'" *ibid.* (citation omitted), the Framers "carefully husband[ed] the appointment power" to "limit its diffusion," *id.* at 883, and to ensure that "*all ... officers* of the Union, will ... be the choice, though a remote choice, of the people themselves," The Federalist No. 39, at 271 (James Madison) (Cynthia B. Johnson ed., 2006) (emphasis added).

Principal Officers—such as ambassadors, judges, and department heads—must be appointed by the

President "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. Congress may, however, "vest the Appointment of such inferior Officers ... in the President alone, in the Courts of Law, or in the Heads of Departments." *Ibid.* "Unless their selection is elsewhere provided for" in the Constitution—as with the President himself—*every* federal official whose position is "'established by Law'" and who exercises "significant authority" must be appointed under the Appointments Clause. *Buckley* v. *Valeo*, 424 U.S. 1, 118, 126, 132 (1976) (per curiam) (citation omitted).

For years, no one (including government counsel) seemed to know how SEC ALJs were selected; only during recent litigation, and in response to a discovery order from a federal judge, did the Commission disclose that its ALJs are "hired" by its Chief Administrative Law Judge from a list of three candidates identified by the Office of Personnel Management. Pet. App. 296a-297a. It is not disputed that this hiring process is not consonant with the Appointments Clause. U.S. Cert. Br. 19; Pet. App. 87a. As Judge Elliot recently acknowledged, "if in fact I am an officer, then I would not hold my position lawfully." Transcript at 6:14-16, *In re David S. Hall*, Admin. Proc. No. 3-17228 (Dec. 20, 2017).

Article II and this Court's precedents make clear that the category of constitutional "Officers" is purposefully broad and includes adjudicators who decide the rights of citizens under federal law. SEC ALJs are Officers because they preside over adversarial enforcement proceedings in which they take testimony, rule on the admissibility of evidence, conduct trials, and enforce compliance with their orders. The panel's

approach, which would exempt from the Appointments Clause all officials without final decision-making authority, cannot be reconciled with this Court's precedents. And by treating its ALJs as though they were independent adjudicators, the Commission has evaded the very accountability the Clause was designed to ensure.

A. The Category Of Constitutional Officers Is Expansive

This Court has consistently applied a simple, sweeping definition of "Officer": *Every* official whose position is "'established by Law'" and who exercises "significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" the Appointments Clause. *Buckley*, 424 U.S. at 125-26 (quoting U.S. Const. art. II, § 2, cl. 2).

1. *Buckley*'s broad definition of "Officer" makes perfect sense of the constitutional text and purpose and two centuries of this Court's precedents.

The Clause's text is intentionally inclusive. *See* 2 Samuel Johnson, *A Dictionary of the English Language*, s.v. "officer" (6th ed. 1785) ("A man employed by the publick"); 2 Noah Webster, *An American Dictionary of the English Language*, s.v. "officer" (1828) ("A person commissioned or authorized to perform any public duty"); *see also* William Blackstone, 3 *Commentaries on the Laws of England* 327-46 (1765) ("officer" refers to, among other persons, "sheriffs; coroners; justices of the peace; constables; surveyors of highways; and overseers of the poor"). Indeed, historical evidence suggests an even broader meaning, "encompass[ing] any individual who had ongoing responsibility for a governmental duty." Jennifer L. Mascott,

Who Are 'Officers of the United States'?, 70 Stan. L. Rev. (forthcoming 2018) (manuscript at 8).

A broad construction of "Officer," furthermore, is crucial to the "structural safeguar[d]" the text provides. *Edmond*, 520 U.S. at 659. The Framers "understood ... that by limiting the appointment power" to those who were readily identifiable, "they could ensure that those who wielded it were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884. An unduly narrow definition of Officer would invite precisely the sort of "diffusion of the appointment power" that the Clause was designed to prevent. *Id.* at 878.

Buckley's broad definition of "Officer" also reflects two centuries of decisions holding a wide range of officials to be subject to the Clause—including:

- district-court clerks, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839);
- a clerk to an assistant treasurer in Boston, *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393-94 (1868);
- engineers and assistant surgeons, *United States* v. *Perkins*, 116 U.S. 483, 484 (1886); *United States* v. *Moore*, 95 U.S. 760, 762 (1878);
- "thousands of clerks in the Departments of the Treasury, Interior and the othe[r]" departments, *United States* v. *Germaine*, 99 U.S. 508, 511 (1879), responsible for "the records, books, and papers appertaining to the office," *Hennen*, 38 U.S. (13 Pet.) at 259;
- judges of election and federal marshals, *Ex parte Siebold*, 100 U.S. 371, 397-99 (1880);

- "commissioners of the circuit courts" who "t[ook] ... bail for the appearance of persons charged with crime," *United States* v. *Allred*, 155 U.S. 591, 594 (1895);
- extradition commissioners, *Rice* v. *Ames*, 180 U.S. 371, 378 (1901);
- district-court commissioners, *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 352-54 (1931); and
- U.S. attorneys, *Myers* v. *United States*, 272 U.S. 52, 159 (1926).

Only individuals with "no general functions, nor any employment which has any duration as to time," whose posts lack "tenure, duration, continuing emolument, or continuous duties," and who "ac[t] only occasionally and temporarily" have been held by this Court to be employees who fall outside the Clause. *Auffmordt* v. *Hedden*, 137 U.S. 310, 327 (1890); *see also Buckley*, 424 U.S. at 126 n.162 ("employees" are "lesser functionaries subordinate to" Officers).

2. This Court's post-*Buckley* cases confirm that non-Article III adjudicators—who pass upon the rights of citizens in contested proceedings under federal law—are Officers because they wield significant federal authority, regardless of whether their decisions are subject to review by a superior Officer. Since the Founding, this Court has *never* found a federal adjudicator who presides over adversarial proceedings to be a mere employee exempt from the Clause—while finding a wide range of quasi-judicial officials to be Officers.

The critical decision is *Freytag*, in which this Court held that special trial judges ("STJs") of the

U.S. Tax Court were Officers because they held positions "'established by Law'" and exercised authority "so 'significant' that it was inconsistent with the classifications of ... employees." 501 U.S. at 880-82 (citation omitted). STJs could make final decisions in some cases; but in other cases (including *Freytag* itself) they lacked final decision-making power and could issue only proposed opinions, which the Tax Court was free to accept or reject. *Id.* at 882. Even when they could not enter final decisions, this Court unanimously held, STJs acted as Officers because they "exercised significant discretion" in performing "important functions"—specifically, "tak[ing] testimony," "conduct[ing] trials," "rul[ing] on the admissibility of evidence," and "enforc[ing] compliance with discovery orders." *Id.* at 881-82; *accord id.* at 901 (Scalia, J., concurring in part and concurring in the judgment). And when STJs could enter final decisions, that was an independent reason why they were Officers. *Id.* at 882 (majority op.).

This Court has since held that military judges, too, are Officers based on their significant adjudicatory duties. In *Weiss* v. *United States*, 510 U.S. 163 (1994), the Court explained that military trial and appellate judges are Officers "because of the authority and responsibilities [they] possess," which include ruling on procedural and legal issues and adjudicating offenses under the Uniform Code of Military Justice. *Id.* at 167-69. In *Edmond*, the Court recognized that intermediate appellate military judges are Officers, in part because they "independently 'weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact.'" 520 U.S. at 662 (quoting 10 U.S.C. § 866(c)). They also could enter "a final decision on behalf of the United States" when "permitted to do so by other Executive officers." *Id.* at 665; *see*

also Ryder v. *United States*, 515 U.S. 177, 180-88 (1995).

Over the years, the Court has considered a variety of quasi-judicial officials—including clerks, commissioners, and non-Article III judges—and held that *all* of them are Officers. *See generally* Mascott, *supra*; Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 799-803, 810-14 (2013). For example, court commissioners (the predecessors of today's magistrate judges) are constitutional Officers at least in part based on their adjudicatory functions in adversarial proceedings. *Go-Bart*, 282 U.S. at 353 n.2 (commissioners "take oaths and acknowledgments" and "take recognizances from witnesses on preliminary hearings"); *Allred*, 155 U.S. at 595 (commissioners "sit as judge or arbitrator ... between the captains and crews of ... vessels" and "take testimony and proofs of debt in bankruptcy proceedings").

Like all these other federal adjudicators, SEC ALJs are Officers within the meaning of the Appointments Clause.

B. SEC ALJs Have All The Characteristics Of Officers

It is not reasonably debatable that SEC ALJs hold offices established by law, or that they exercise authority—including ruling on the admissibility of evidence, taking testimony, and conducting trials—previously deemed sufficiently "significant" to confer Officer status. *Freytag*, 501 U.S. at 881-82. This Court need go no further to conclude that SEC ALJs are Officers.

1. Offices Established By Law

The positions held by SEC ALJs are indisputably "'established by Law.'" *Freytag*, 501 U.S. at 881 (citation omitted); *Bandimere* v. *SEC*, 844 F.3d 1168, 1179 (10th Cir. 2016). Like the STJs in *Freytag*, SEC ALJs' "duties, salary, and means of appointment" are all "specified by statute." 501 U.S. at 881; *see* 5 U.S.C. §§ 556-57 (establishing ALJs' position and powers in hearings); *id.* § 5372 (establishing salaries); *id.* § 3105 (establishing hiring practices). Commission regulations further define SEC ALJs' powers. *See, e.g.*, 17 C.F.R. §§ 200.14, 201.111. An ALJ's position is also not "temporary," *Freytag*, 501 U.S. at 881; ALJs "receiv[e] a career appointment," 5 C.F.R. § 930.204(a), and may be removed only for cause, *see* 5 U.S.C. § 7521(a). There can be no serious dispute that SEC ALJs hold offices established by law.

2. Significant Federal Authority

SEC ALJs also unquestionably "'exercis[e] significant authority pursuant to the laws of the United States.'" *Freytag*, 501 U.S. at 881 (quoting *Buckley*, 424 U.S. at 126); *see Bandimere*, 844 F.3d at 1178, 1188 (table summarizing SEC ALJs' duties and showing they "carry out 'important functions'" and "'exercis[e] significant authority'"). The Commission has endowed its ALJs with a litany of substantive and procedural powers that require the exercise of broad discretion and closely parallel the authority of the STJs in *Freytag*.

a. In overseeing SEC administrative hearings, ALJs exercise authority over a wide range of matters at every stage of the case, including:

- amending charging documents, 17 C.F.R. § 201.200(d)(2);

- entering orders of default, *id.* § 201.155;
- consolidating proceedings, *id.* § 201.201(a);
- "[a]dminister[ing] oaths and affirmations," *id.* §§ 200.14(a)(1), 201.111(a);
- "[i]ssu[ing] subpoenas," *id.* §§ 200.14(a)(2), 201.111(b);
- ordering depositions and acting as the "deposition officer," *id.* §§ 201.233-.234;
- ordering production of evidence and regulating document production, *id.* §§ 201.111(b), .230, .232;
- issuing protective orders, *id.* § 201.322;
- "[r]ul[ing] upon motions," including for summary disposition, *id.* §§ 200.14(a)(7), 201.111(h), .250;
- rejecting filings for procedural noncompliance, *id.* § 201.180(b);
- granting extensions of time and stays, *id.* § 201.161;
- "[h]old[ing] pre-hearing conferences" and "requir[ing]" attendance at such conferences, *id.* §§ 200.14(a)(6), 201.111(e), .221(b);
- ordering prehearing submissions, *id.* § 201.222(a);
- "[r]egulat[ing] the course of [the] hearing," *id.* §§ 200.14(a)(5), 201.111(d);
- receiving "relevant evidence" and ruling upon admissibility, *id.* § 201.111(c);
- "[r]ul[ing] on offers of proof," *id.* §§ 200.14(a)(3), 201.111(c);

- "[e]xamin[ing] witnesses," *id.* § 200.14(a)(4);
- regulating the scope of cross-examination, *id.* § 201.326;
- regulating "the conduct of the parties and their counsel," *id.* § 201.111(d); and
- imposing sanctions for "contemptuous conduct," *id.* § 201.180(a).

As the Tenth Circuit recognized, "STJs and ALJs closely resemble one another where it counts." *Bandimere*, 844 F.3d at 1187. Like the STJs that this Court addressed in *Freytag*, SEC ALJs "take testimony," "conduct trials," "rule on the admissibility of evidence," "enforce compliance with discovery orders," and otherwise perform "more than ministerial tasks." 501 U.S. at 881-82. To be sure, SEC ALJs cannot impose fines or imprisonment for contempt. But that is true of most administrative agency officials, *see ICC* v. *Brimson*, 154 U.S. 447, 488-89 (1894), including STJs, *see* 26 U.S.C. § 7456(c).

b. In addition to performing the same functions found significant in *Freytag* (and then some), SEC ALJs "prepare an initial decision containing the conclusions as to the factual and legal issues presented," 17 C.F.R. §§ 200.14(a)(8), 201.111(i), .141(b), .360(a), in which the ALJ "publicly states whether respondents have violated securities laws and imposes penalties for violations," *Bandimere*, 844 F.3d at 1180 n.25. If no timely petition for review is filed or if the Commission declines review, the ALJ's initial decision by statute "shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission." 15 U.S.C. § 78d-1(c); *accord* 5 U.S.C. § 557(b) (ALJs' "initial decisions" automatically become final "without further proceedings" absent further review).

On the relatively rare occasions the Commission *does* review an ALJ's initial decision, the Commission does not review the decision anew, but defers to the ALJ's credibility determinations and factual findings. *See In re Clawson*, Exchange Act Release No. 48,143, 2003 WL 21539920, at *2 (July 9, 2003) ("We accept [an SEC ALJ's] credibility finding, absent *overwhelming evidence* to the contrary" (emphasis added)); *In re Bridge*, Securities Act Release No. 9,068, 2009 WL 3100582, at *18 n.75 (Sept. 29, 2009) (similar). Because the Commission views its ALJs as "'in the best position to make findings of fact ... and resolve any conflicts in the evidence,'" Pet. App. 241a (citation omitted), the Commission relies heavily, if not solely, on their findings and determinations.

c. This case is a prime illustration of how SEC ALJs exercise significant authority in shaping the record. As the Commission emphasized, SEC ALJs play a "vital role" in the adjudicative process. Pet. App. 241a. The Commission even remanded the case to Judge Elliot for additional factual findings, *id.* 239a, because those findings were "a matter of considerable importance" to the Commission, *id.* 241a. Judge Elliot was the only adjudicative official in this entire proceeding who saw and heard the witnesses testify, who reviewed all the evidence, and who directly and irrevocably shaped the record through evidentiary and other rulings. A different adjudicator neutrally exercising the same discretion could easily have decided the case in Lucia's favor, or declined to impose a permanent bar.

Judge Elliot exercised federal authority in developing the factual basis for the liability and sanctions orders. Despite relying heavily on the testimony of

two audience members on the critical issue of materiality, Judge Elliot made it nearly impossible for Lucia to challenge, or the Commission meaningfully to review, his shaky credibility determinations. For example, although one witness had admitted to filing a false claim against Lucia, Judge Elliot excluded evidence related to that false claim, so there was "no evidence" in the record to controvert his credibility determination. Pet. App. 193a. The Commission consequently deferred to Judge Elliot's findings based on the witnesses' testimony. *See id.* 69a-70a.

Judge Elliot's exercise of federal authority extended to legal issues as well. Most saliently, the Commission—by a 3-2 vote—sustained Judge Elliot's determination that Lucia's presentations were misleading because their use of the word "backtest" did not "mee[t] the definition of 'backtest' that [Judge Elliot] ha[d] adopted." Pet. App. 171a. Judge Elliot's definition, however, had been "create[d] from whole cloth." *Id.* 111a (dissenting op.). Despite the lack of any preexisting statutory or regulatory definition of the term, and even though Lucia offered industry examples of "backtests" that were not based exclusively on historical data, *id.* 52a-53a (majority op.), the Commission validated Judge Elliot's rulemaking-by-opinion by adopting his definition wholesale, *id.* 66a.

Although Lucia petitioned for judicial review of the liability and sanctions orders, the D.C. Circuit panel began its merits discussion with the observation that "[o]ur review is deferential," Pet. App. 22a—and then proceeded to defer to the Commission, *id.* 26a-32a, 33a, 35a, which in turn had relied extensively on Judge Elliot's findings and credibility determinations, *e.g.*, *id.* 40a, 62a-64a, 69a-70a. An unconstitutional official thus established both the legal and factual

predicates for the ensuing actions of the SEC and the court of appeals—including the lifetime bar imposed on Lucia.

* * *

The authority of SEC ALJs mirrors that of the STJs in *Freytag*, as well as the military judges in *Weiss* and *Edmond*. Under this Court's established (and unbroken) line of Appointments Clause jurisprudence, SEC ALJs are Officers because they adjudicate adversarial enforcement proceedings. *That* should begin, and end, the analysis.

C. The D.C. Circuit Panel Erred In Holding That SEC ALJs Are Not Officers

Without addressing the many important and discretionary duties exercised by SEC ALJs, the panel held that, under D.C. Circuit precedent, the "analysis begins, and ends," with whether SEC ALJs can issue unreviewable final decisions of the Commission, and concluded that they cannot. Pet. App. 13a. The panel further refused to distinguish that precedent based on the level of deference the Commission affords its ALJs. *Id.* 18a-19a. This Court's precedents make clear, though, that authority to issue final decisions is not a prerequisite of Officer status, and the standard of review simply is "not relevant" to the analysis. *Freytag*, 501 U.S. at 874 n.3.

1. Final Decision-Making Authority

The panel uncritically relied on a previous decision in which a divided panel of the D.C. Circuit had held that Officers must have the "power of final decision." *Landry* v. *FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000); *see* Pet. App. 13a. Confining the Appointments Clause's reach to officials invested with the power of

final decision, however, contravenes this Court's teaching in *Freytag*. At minimum, confining the Clause's reach to those who can issue *unreviewable* final decisions cannot be reconciled with this Court's teaching in *Edmond*. As this Court has explained, the authority to issue final decisions distinguishes inferior Officers from principal Officers; it is not, and cannot be, a *sine qua non* for the Clause to apply at all. Regardless, SEC ALJs can and do enter decisions that become final with—or without—the possibility of Commission review.

a. *Freytag* expressly rejected the argument that inability to make final decisions takes officials outside the Appointments Clause. 501 U.S. at 880-82. In many cases, including *Freytag* itself, STJs "lack[ed] authority to enter a final decision," and merely "assist[ed]" the Tax Court "in taking the evidence and preparing the proposed findings and opinion." *Id.* at 880-81. *Freytag* held that deeming those adjudicators mere employees on that basis would "ignor[e] the significance of the duties and discretion that [the] judges possess[ed]"—namely, that they "perform[ed] more than ministerial tasks," including "tak[ing] testimony," "conduct[ing] trials," and "rul[ing] on the admissibility of evidence." *Id.* at 881-82.

To be sure, the *Freytag* Court reasoned that "*[e]ven if* the duties of special trial judges ... were not as significant as we ... have found them to be, our conclusion would be unchanged" because STJs could issue final decisions in *other* cases. 501 U.S. at 882 (emphasis added). But that "unchanged" "conclusion" (*i.e.*, holding) was that STJs' duties and discretion render them Officers, even when they cannot enter final decisions. *See id.* at 881-82. Indeed, this Court expressly "agree[d]," *id.* at 881, with a Second Circuit

decision that had held that STJs are Officers because they "exercise a great deal of discretion and perform important functions" even in cases where "the ultimate decisional authority ... rests with the Tax Court judges." *Samuels, Kramer & Co.* v. *Comm'r*, 930 F.2d 975, 985 (2d Cir. 1991).

The D.C. Circuit is the only appellate court to have misread *Freytag* as imposing a requirement of final decision-making authority as a prerequisite to Officer status. *See Burgess* v. *FDIC*, 871 F.3d 297, 301 (5th Cir. 2017) (*Freytag*'s "additional statement—that [STJs'] duties and discretion, coupled with the power to enter final judgments also makes the STJs Officers—was dicta or an alternative basis for its decision"); *Bandimere*, 844 F.3d at 1184 (*Freytag* "did not make final decision-making power the essence of inferior officer status"); *see also Landry*, 204 F.3d at 1142 (Randolph, J., concurring in part and concurring in the judgment) (*Freytag*'s discussion of final decision-making authority was "clearly designated ... as an alternative holding").

The D.C. Circuit's reading is not only unique; it is also wrong. Time and again, this Court has held that adjudicators who lacked final decision-making authority nevertheless were constitutional Officers. *See, e.g.*, *Go-Bart*, 282 U.S. at 352, 354 ("All the [commissioner's] acts ... were preparatory and preliminary to a consideration of the charge by a grand jury and ... the final disposition of the case in the district court"); *Allred*, 155 U.S. at 595 (commissioners are "subject to the orders and directions of the court appointing them"); *accord Weiss*, 510 U.S. at 168 ("No sentence imposed [by the military trial judge] becomes final until it is approved by the officer who convened the court-martial"). The approach taken by the D.C.

Circuit, in *Landry* and the panel decision in this case, cannot be reconciled with these precedents.

b. The panel further erred by holding that officials whose decisions *can and do* become the agency's final word are not Officers, so long as their decisions are subject to "discretionary review" by principal Officers. Pet. App. 16a. That holding conflicts with this Court's decision in *Edmond*.

Edmond held that judges on the Coast Guard Court of Criminal Appeals were inferior Officers because their decisions were always subject to further discretionary review by principal Officers—namely, the Court of Appeals for the Armed Forces—whether by *sua sponte* order of the Judge Advocate General or where the CAAF exercised its discretion to grant review. 520 U.S. at 664-65; *see* 10 U.S.C. § 867(a). This lack of "power to render a final decision ... unless permitted to do so by other Executive officers," *Edmond* explained, is the defining *feature* of "'inferior officers.'" 520 U.S. at 663, 665. It did not render the adjudicators mere employees.

Here, too, this Court has repeatedly held that officials who cannot render an unreviewable final decision of the Executive Branch are nevertheless Officers:

- district-court commissioners, *Go-Bart*, 282 U.S. at 352, 354;
- circuit-court commissioners, *Allred*, 155 U.S. at 594-95;
- military trial and appellate judges, *Weiss*, 510 U.S. at 168-69;

- judges of the Coast Guard Court of Military Review, *Ryder*, 515 U.S. at 180-88; *Edmond*, 520 U.S. at 653, 665;
- judges of the Coast Guard Court of Criminal Appeals, *Edmond*, 520 U.S. at 662-66;
- members of the Public Company Accounting Oversight Board, *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 486 (2010); *see also Free Enter. Fund* v. *PCAOB*, 537 F.3d 667, 673 (D.C. Cir. 2008).

None of these officials would be Officers under the D.C. Circuit's finality test, yet this Court has held that *all* of them are.

The D.C. Circuit's finality test would even exclude federal magistrate judges, who, like SEC ALJs, have power to issue decisions that can become final, 28 U.S.C. § 636(b)(1)(C); make evidentiary rulings, *id.* § 636(b)(1)(B); and preside over trials, *id.* § 636(a)(3). Although magistrate judges cannot (absent consent) render unreviewable final decisions on the merits, *id.* § 636(b)(1)(A), there is no question but that their ability to shape the evidentiary record is alone sufficient to render them Officers. *Cf. Butz* v. *Economou*, 438 U.S. 478, 513 (1978) ("[T]he role of the ... administrative law judge ... is 'functionally comparable' to that of a judge.... He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions."). SEC ALJs are Officers for at least the same reason.

Officers do not need to possess the authority to issue unreviewable final decisions. "The question," as the Office of Legal Counsel has explained, "is simply whether a position possesses delegated sovereign authority to act in the first instance, whether or not that

act may be subject to direction or review by superior officers." *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 75 (2007). SEC ALJs indisputably fit that description.

c. The D.C. Circuit's finality rule confuses the distinction between inferior and principal Officers with the distinction between Officers and employees. As *Edmond* explained, the very term "'inferior officer' connotes a relationship with some higher ranking officer"; their "work is directed and supervised" by such "'principal officer[s].'" 520 U.S. at 662-63. *Edmond* emphasized that the lack of "power to render a final decision ... unless permitted to do so by other Executive officers" thus distinguishes "'inferior officers'" from the "'principal officer[s]'" who supervise them. *Id.* at 663, 665; *see also Dep't of Transp.* v. *Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1239 (2015) (Alito, J., concurring) ("Inferior officers can do many things, but nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it").

By treating a defining feature of inferior Officers as a basis for *exempting* officials from the Appointments Clause, the D.C. Circuit's approach subverts the Framers' design. Article II provides for execution of the laws by the President, aided by principal Officers *and* a cadre of inferior Officers they direct. The Appointments Clause by its terms covers *both* types of Officers. U.S. Const. art. II, § 2, cl. 2. Under the D.C. Circuit's finality rule, however, only officials with unreviewable final decision-making authority—who primarily if not exclusively will be *principal* Officers—would be subject to the Clause. That approach would remove the Constitution's "structural safeguar[d]" from all first-line adjudicators. *Edmond*, 520 U.S. at

659. Indeed, the D.C. Circuit's finality rule would virtually erase the category of "inferior Officers" from the text of our Constitution.

d. Even if final decision-making authority were necessary to Officer status, SEC ALJs still would be Officers because they can and do enter decisions that become final with—or without—any possibility of Commission review.

To begin, SEC rules "expressly authorize" ALJs to issue default orders to levy "sanctions and to impose cease-and-desist orders via default." *In re Alchemy Ventures, Inc.*, Exchange Act Release No. 70,708, 2013 WL 6173809, at *4 (Oct. 17, 2013) (citing 17 C.F.R. § 201.155(a)). Although the current practice is for ALJs to issue initial decisions in cases of default, the Commission has "emphasize[d]" that its ALJs' prior default orders are valid and judicially "enforceable" without *any* Commission review. *Ibid.*

In about 90% of cases, moreover, the ALJ's initial decision "become[s] final without plenary agency review." *Bandimere*, 844 F.3d at 1180 n.25 (citing 17 C.F.R. § 201.360(d)(2)); *see also* SEC, ALJ Initial Decisions, https://www.sec.gov/alj/aljdec.shtml. Unlike the recommended decisions rendered by some agency adjudicators (including the FDIC ALJs in *Landry*), which have no effect unless affirmatively adopted by the agency, the initial decisions entered by SEC ALJs "becom[e] the decision of the agency" as a matter of course unless overturned on appeal. 5 U.S.C. § 557(b); U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act*, 82-83 (1947) (stating that an "initial decision *will become the agency's final decision* in the absence of an appeal to or review by the agency" (emphasis added)).

When no petition for review is filed with the Commission, "the agency may simply enter an order stating an initial decision is final *without engaging in any review*." *Bandimere*, 844 F.3d at 1184 n.36 (emphasis added). In such cases, the Commission's regulations provide that it "will issue an order that the [ALJ's] decision has become final." 17 C.F.R. §§ 201.360(a)(1), .360(d)(2). The finality order is non-discretionary and issues as a matter of course after 42 days when no petition for review has been filed. *See id.* §§ 201.360(d)(2), .410(b), .411(c); *see also, e.g.*, *In re Horizon Wimba, Inc.*, Exchange Act Release No. 75,929, 2015 WL 5439958, at *1 (Sept. 16, 2015) ("The time for filing a petition for review ... has expired. No such petition has been filed ... , and the Commission has not chosen to review the decision .... Accordingly ... the initial decision ... has become the final decision of the Commission."). And even when review is sought, "[t]he Commission may decline to review any [ALJ] decision." 17 C.F.R. § 201.411(b)(2); *see also In re Bellows*, Exchange Act Release No. 40,411, 1998 WL 611766 (Sept. 8, 1998) (declining review of an initial decision).

Because SEC ALJs can enter default judgments and initial decisions that "become final without any review or revision from an SEC Commissioner," *Bandimere*, 844 F.3d at 1187, they are Officers even under the D.C. Circuit's crabbed view of the Appointments Clause.

2. Standard Of Review

The Tax Court's standard of review was "not relevant to [the Court's] grant of certiorari" in *Freytag*, 501 U.S. at 874 n.3, and the Court ascribed no significance to the deference afforded to STJs, *see id.* at 880-82. It would have been remarkable, in fact, if this

Court *had* attributed constitutional significance to the degree of deference an agency applies in reviewing the decisions of those exercising delegated authority. The standard of review often is the agency's own creation. The Tax Court "had discretion to pick whatever standard of review it saw fit" and applied deferential review based on an "internal rule of procedure." *Lardry*, 204 F.3d at 1142 (Randolph, J., concurring in part and concurring in the judgment). Whether the Appointments Clause applies to an adjudicator cannot turn on how thoroughly the agency *chooses* to review the adjudicator's decisions.

Even when the Commission grants review, it affords ALJ credibility findings "considerable weight," *Bandimere*, 844 F.3d at 1193 (Briscoe, J., concurring), accepting them "absent *overwhelming evidence to the contrary*," *Clawson*, 2003 WL 21539920, at *2 (emphasis added). Unsurprisingly, SEC ALJs' rulings are in fact rarely disturbed. The ALJ who presided over Lucia's case, for example, had apparently *never* been reversed by the SEC in more than 50 prior cases. Lynch, *SEC Judge*; *see also* Eaglesham, *SEC Wins* (finding that in a recent four-and-a-half-year period the Commission ruled for the agency in 95% of its cases, including 88% of cases where the underlying conduct was disputed). The Commission's established practice of rubber-stamping ALJ decisions heightens the importance of ensuring that the Commission itself take political accountability for those decisions.

D. Congress Provided That SEC ALJs Are Executive Officers

Congress expressly provided that SEC ALJs are subordinate "officers" of the Commission. The Commission nevertheless touts its in-house judges as "in-

dependent adjudicators" who conduct hearings "similar to federal bench trials." SEC, Office of Administrative Law Judges, https://www.sec.gov/alj. It is misleading—to courts, regulated persons and entities, and the investing public—for the Commission to represent that its captive adjudicators are independent. The Appointments Clause requires the Commission to accept responsibility for its ALJs because they ultimately exercise *executive* power.

1. This Court long ago recognized that the Appointments Clause is triggered when Congress denominates an official an "officer"—because if Congress meant "others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government." *Germaine*, 99 U.S. at 510. This principle—which complements *Buckley*'s functional test—provides further grounds for rejecting the panel's conclusion that SEC ALJs are mere employees.

a. Both the federal securities laws, which were enacted between 1933 and 1940, and the APA, which was enacted in 1946, specifically recognize ALJs—or, as they were known then, "hearing examiners"—as "officers."

The securities laws repeatedly refer to SEC ALJs as "officers of the Commission." 15 U.S.C. §§ 77u, 78v, 80a-40, 80b-12. Elsewhere in the securities laws, Congress expressly distinguished "officers" and ALJs from mere "employees." *See, e.g.*, *id.* § 717q ("Appointment of officers and employees"); *id.* § 78d-1(a) (delegation of authority to "an administrative law judge ... or an employee"). Because Congress consistently deemed SEC ALJs "officers," it presumably adopted the "settled meaning" of that term. *Beck* v. *Prupis*, 529 U.S. 494, 500-01 (2000).

The APA, as enacted, similarly referred to hearing examiners as "subordinate officers" or "officers" *nine* times. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, 241-42 (1946) (deeming hearing examiners "officers," "presiding officers," and "subordinate officers"); Pet. App. 270a-273a. Indeed, Congress *defined* "officer" in the APA as "an individual ... required by law to be appointed in the civil service by" "the President," "a court of the United States," or "the head of an Executive agency" or "military department." 5 U.S.C. § 2104(a)(1). That definition fits hand-in-glove with the Appointments Clause's requirement that inferior Officers be appointed by "the President alone," "the Courts of Law," or "the Heads of Departments." U.S. Const. art. II, § 2, cl. 2; *see also Free Enter. Fund*, 561 U.S. at 512-13 (multimember agency acting collectively can be a "Head of Department").

b. In enacting the APA, "Congress intended to make [ALJs] 'a special class of semi-independent'" yet still "'*subordinate* hearing officers.'" *Ramspeck* v. *Fed. Trial Exam'rs Conference*, 345 U.S. 128, 132 (1953) (emphasis added) (citation omitted). This "'[l]ong settled and established practice,'" *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (alteration in original) (citation omitted), further confirms that SEC ALJs are Officers rather than mere employees.

When the APA was enacted, it was well understood that hearing examiners would be executive Officers. Congress rejected a proposal for the Judicial Conference to appoint hearing examiners because that body was not constitutionally authorized to make appointments—thus recognizing that hearing examiners were Officers. *See Administrative Procedure Act: Legislative History, 79th Congress, 1944-46*, at 42

(1946) ("*Legislative History*"). And the Attorney General opined that hearing examiners were "inferior officers" even though their tenure and compensation were controlled by the Civil Service Commission. *Administrative Procedure Act, Promotion of Hearing Examiners*, 41 Op. Att'y Gen. 74, 79-80 (1951).

When it was debating the APA, Congress was cognizant of concerns that hearing examiners were "mere tools of the agency concerned" because "their compensation and promotion depended upon" performance ratings given by the agency. *Ramspeck*, 345 U.S. at 130-31. Congress concluded, however, that to completely separate agencies' "quasi-judicial functions from [their] purely administrative functions" would "destroy[] the usefulness of such agencies." *Legislative History* 244. Congress thus specifically rejected proposals to make hearing examiners fully independent of the Executive, whether by creating "a completely separate 'examiners' pool,'" *id.* 215, establishing within each agency a "judicial section" "wholly independent of ... executive control," *id.* 242, or creating a separate "administrative court" to hear cases for all agencies, *ibid.* In other words, Congress decided *not* to confer adjudicative independence on these administrative tribunals.

Congress instead gave hearing examiners only limited separation from their agencies with respect to "their tenure and compensation." *Ramspeck*, 345 U.S. at 132 n.2 (citation omitted). In doing so, Congress expanded on then-recent precedent approving certain restrictions on the President's ability to remove "quasi-judicial" officials. *See Humphrey's Executor* v. *United States*, 295 U.S. 602, 629 (1935). It is an interesting question whether ALJs' current two (or three) layers of for-cause protection, *see* 5 U.S.C. §§ 1202(d),

7521(a), are one (or two) more than the separation of powers will tolerate. *See Free Enter. Fund*, 561 U.S. at 507 n.10 (reserving the question). But that question is not presented at this stage of this case, *see* Cert. Reply 9-11, and has no bearing on whether SEC ALJs are Officers in the first place.

In every other significant respect, Congress made hearing examiners—like today's ALJs—subordinate to their respective agencies. To this day, the statutes give agencies control over ALJs' appointment, *see* 5 U.S.C. § 3105; their powers, including procedural rules, *id.* § 556(c), and substantive authority, *id.* § 557(b); and even their removal, subject to a determination of good cause by the Merit Systems Protection Board, *id.* § 7521(a). Agencies also can reverse their ALJs' initial decisions or reject their recommendatory decisions. *Id.* § 557(b). By design, therefore, agencies such as the SEC "direc[t] and supervis[e]" the work of their subordinate ALJs. *Edmond*, 520 U.S. at 663.

2. The securities laws and the APA put to rest any argument that SEC ALJs should be considered employees rather than Officers because they exercise adjudicatory functions. Because ALJs exercise *executive* power, the concept of adjudicatory "independence" is entirely misplaced in this context.

a. Just as nobody would think that the Commission *itself* is an "independent" adjudicator, even though it is statutorily authorized to decide enforcement proceedings, there should be no illusion that its subordinate Officers are "independent," either. Unlike Article III judges, the Commission and its ALJs implement Commission policy and thereby *exercise* executive power, rather than check it.

The Constitution creates a single "safeguard" to protect litigants' "'right to have claims decided by judges who are free from potential domination by other branches of government.'" *CFTC* v. *Schor*, 478 U.S. 833, 848 (1986) (citation omitted). That safeguard is Article III, which provides judges with life tenure and permanent salary to protect their independence from, and ensure their ability to check, the political branches. U.S. Const. art. III, § 1; *see also Schor*, 478 U.S. at 848. But the Constitution provides "no such guaranties" with respect to other adjudicators, *McAllister* v. *United States*, 141 U.S. 174, 187 (1891)—including those in territorial courts, *ibid.*, Article I courts, *Palmore* v. *United States*, 411 U.S. 389, 390 (1973), and administrative agencies, *Schor*, 478 U.S. at 848, 853-55, 858. This is true whether they are called "hearing examiners," "administrative law judges," or anything else.

Even when they act as adjudicators, executive Officers do not check, but exercise executive power. As this Court long ago explained, "administrative duties" that "involv[e] an inquiry into the existence of facts and the application to them of rules of law" are, in a sense, "judicial acts." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1856). But that does not "bring such matters under the judicial power." *Ibid.*

The Comptroller of the Treasury, for example, originally adjudicated claims involving debts owed to the United States. *See* An Act to Establish the Treasury Department, 1 Stat. 65, 66 (1789). Yet the Comptroller still was "dependent upon the President" because such adjudication was in service of a classically executive function—collecting revenue. 1 Annals of

Congress 635-36 (1789). Similarly, the Court of Customs Appeals adjudicated certain customs cases involving the United States. *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929). But because those claims concerned "the executive administration and application of the customs laws," they could be "committed exclusively to executive officers" subordinate to their superiors. *Ibid.*

Congress gave the Commission a choice of tribunals for enforcing the federal securities laws. If the Commission is willing and able to prove its case before an independent adjudicator, it may bring an action in an Article III district court. *See* 15 U.S.C. § 78u(d). And if the Commission is not prepared to proceed in federal court, it may adjudicate an enforcement action itself or designate one of its ALJs to do so. *Id.* §§ 78u, 78v. What the Commission *cannot* do is have it both ways, reaping the benefits of its in-house tribunal while holding its ALJs out as "independent" adjudicators.

b. A consistent line of OLC opinions has explained that ALJs are Officers whose duties "are generally executive in nature, because the ALJs determine, on a case-by-case basis, the policy of an executive branch agency." *Sec'y of Educ. Review of Admin. Law Judge Decisions*, 15 Op. O.L.C. 8, 14-15 (1991). The ALJs at issue could not enter unreviewable final decisions for the Executive Branch, OLC opined, precisely because "all executive power ... must ultimately be subject to Presidential control." *Id.* at 14; *see also Authority of Educ. Dep't Admin. Law Judges in Conducting Hr'gs*, 14 Op. O.L.C. 1, 3 (1990) (concluding that ALJs' "limited 'independence'" in terms of tenure protection "does not, however, mean that ALJs may disregard agency rules that are binding on them").

In *Freytag*, Justice Scalia (joined by Justices O'Connor, Kennedy, and Souter) confirmed that ALJs "are all *executive* officers." 501 U.S. at 910 (Scalia, J., concurring in part and concurring in the judgment). "Congress *may* commit the sorts of matters administrative law judges ... now handle to Article III courts," Justice Scalia explained, *ibid.*, but when it instead assigns such matters "to traditional executive departments," those tribunals "exercise the executive power, not the judicial power," *id.* at 909. Executive adjudicators therefore *cannot* exercise their power "'independent ... [of] the Executive Branch,'" but must be subject to Executive control. *Id.* at 912.

In *Free Enterprise Fund*, Justice Breyer (joined by Justices Stevens, Ginsburg, and Sotomayor) likewise indicated that ALJs "'are all executive officers.'" 561 U.S. at 542 (Breyer, J., dissenting) (citation omitted). Justice Breyer added that, when the President elects to "regulate through impartial adjudication," "insulation of the adjudicator from removal at will can help him achieve that goal." *Id.* at 522. But like any other executive Officer, the adjudicator otherwise would remain subject to "the President's control." *Id.* at 530; *see also* Transcript of Oral Argument 62, *Dalmazzi* v. *United States*, No. 16-961 (U.S. Jan. 6, 2018) (Breyer, J.) (noting that agencies exercise executive, "not judicial" power when performing "adjudicatory functions in [their] carrying out of executive duties").

The *Free Enterprise Fund* majority reserved the question whether *all* ALJs are "necessarily" Officers. 561 U.S. at 507 n.10. Nor is that question presented here: Of the roughly 1900 "administrative law judges" across all federal agencies, OPM, Administrative Law Judges, https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency,

only about 150 ALJs in 25 agencies apparently preside—as SEC ALJs do—over adversarial enforcement proceedings subject to Sections 556 and 557 of the APA. The vast majority of the remaining ALJs (more than 1650) administer Social Security benefits determinations in non-adversarial proceedings.

The only question in this case is whether the five SEC ALJs—who preside over adversarial enforcement proceedings—are Officers. As the applicable statutes confirm, *that* question must be answered in the affirmative. Adjudicators who wield such significant federal power in a manner that affects the liberty and property rights of citizens are precisely the sort of officials whose appointment should be "accountable to the political force and the will of the people." *Freytag*, 501 U.S. at 884. No "mere employee" can make evidentiary and legal determinations that so profoundly affect individual liberty as Judge Elliot did here.

* * *

The bottom line is that SEC ALJs are executive Officers, as the government now concedes. The remaining question is what this Court should do to redress the constitutional violation that Lucia has suffered at the hands of the Commission.

II. THE CONSTITUTIONAL VIOLATION REQUIRES A MEANINGFUL REMEDY

Because the D.C. Circuit erred in denying Lucia's petition for review, the judgment below should be reversed and the Commission's unlawful decision and order "set aside." 5 U.S.C. § 706(2). Among other things, that would free Lucia from the permanent bar imposed on him at the conclusion of the administrative proceeding (and which has not been stayed during the lengthy period of judicial review).

Because the underlying adjudication itself was conducted in violation of the Appointments Clause, the Constitution requires a new "hearing before a properly appointed" adjudicator. *Ryder*, 515 U.S. at 188; *see also United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (a "defect in [an] examiner's appointment ... would invalidate a resulting order" assuming a timely objection). At minimum, therefore, Lucia is entitled to an entirely new proceeding before a constitutional Officer. A recent order by the SEC, however, indicates that the more consequential remedy of dismissal is appropriate in this case.

A. An Entirely New Proceeding Is Necessary

Where, as here, the federal government has subjected a citizen to proceedings before an unconstitutionally appointed adjudicator, the Constitution requires entirely new proceedings before a constitutional Officer—for two reasons. First, because only a constitutional Officer can exercise significant authority of the United States, the actions of a non-Officer purporting to exercise such authority are null and void. Second, because the Appointments Clause protects inherently "structural interests," *Freytag*, 501 U.S. at 880, an Appointments Clause violation taints the entire proceeding. From a constitutional perspective, therefore, it is as if the proceedings before Judge Elliot never occurred, and the constitutional error can be remedied only by vacating everything done on Judge Elliot's watch.

1. This Court made clear in *Ryder* that, when a non-Officer presides over an adjudicatory proceeding, that proceeding is a nullity as a matter of constitutional law.

In *Ryder*, the government argued that the decisions of two civilian judges on the Court of Military Review who had not been constitutionally appointed were nevertheless valid under "[t]he *de facto* officer doctrine," which in some circumstances "confers validity upon" acts despite technical defects in the actor's title to office. 515 U.S. at 180. But the Court rejected the government's position, holding "that the judges' actions were not valid *de facto*," *id.* at 179, because—unlike other, technical defects to title—an Appointments Clause violation implicates deep separation-of-powers principles, *id.* at 182. The challenger thus was constitutionally entitled to "a hearing before a properly appointed panel." *Id.* at 188.

An entirely new proceeding is constitutionally required because the Appointments Clause serves no "frivolous purpose": It establishes the "exclusive method by which those charged with executing the laws of the United States may be chosen." *Buckley*, 424 U.S. at 118, 125; *see also id.* at 141 (significant authority may be "exercised *only* by persons who are 'Officers of the United States'" (emphasis added)). The Clause is such a critical safeguard that even a litigant's consent to the participation of an unconstitutionally appointed official does not preclude relief. *See Freytag*, 501 U.S. at 878-79.

This Court has been unwavering in recognizing that a defect in "the appointment" of the adjudicator "goes to the validity" of the underlying proceeding. *Freytag*, 501 U.S. at 879; *see also L.A. Tucker Truck Lines*, 344 U.S. at 38 (defect in the appointment of an Officer is "an irregularity" such that the "order should be set aside as a nullity"). Where, as here, the government has engaged in official action in derogation of the Appointments Clause, it is thus on notice that the

consequence of its constitutional violation is, at minimum, an entirely new proceeding.

"Any other rule," this Court has recognized, "would create a disincentive to raise Appointments Clause challenges." *Ryder*, 515 U.S. at 183. After all, without a new hearing, even *successful* challengers would realize no tangible benefit from "protecting the separation-of-powers interests at stake." *Freytag*, 501 U.S. at 879. Likewise, if there is no meaningful consequence for violating the Appointments Clause, the government would have no incentive to comply with its requirements. Because "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government," the legislative and executive branches cannot be relied upon to police each other in this area. *Id.* at 880.

2. An Appointments Clause violation also requires an entirely new proceeding because an improper adjudicator's participation "affect[s] the ... whole adjudicatory framework." *Williams* v. *Pennsylvania*, 136 S. Ct. 1899, 1910 (2016). Indeed, that is the very nature of a structural error: it undermines the proceedings so fundamentally that "the effects of the error are simply too hard to measure." *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

Where one judge on a multimember court sits in violation of the Constitution, for example, "it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process." *Williams*, 136 S. Ct. at 1909. The complaining party must "be granted an opportunity to present his claims to a court unburdened" by the constitutional error—and only "rehearing" can provide that. *Id.* at 1910; *see also Nguyen* v. *United States*, 539 U.S. 69, 80-83

(2003) (participation of a statutorily ineligible panel member requires "fresh consideration ... by a properly constituted panel").

This principle admits of no shortcuts. A litigant who proves that the trial judge was biased, for example, does not win review by a disinterested judge to determine whether the decision was nevertheless fair—he "is entitled to a neutral and detached judge in the first instance." *Ward* v. *Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972). A judge disqualified by a "direct pecuniary interest in the outcome" of the proceeding cannot cure the violation retroactively by forfeiting any monetary gain; "[n]o matter what the evidence [is] against" the defendant, he is "entitled to halt the trial" because "he ha[s] the right to have an impartial judge." *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927). And a litigant who proves racial discrimination in the selection of a grand jury is entitled to an entirely new trial, "even if [the] grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense." *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986).

3. The Appointments Clause violation here thus requires the Court to "set aside as a nullity" all of Judge Elliot's actions going back to the Commission's issuance of the order instituting proceedings, the last official act before the involvement of an unconstitutional adjudicator. *L.A. Tucker Truck Lines*, 344 U.S. at 38. There is no question but that Judge Elliot's participation "affected ... the whole adjudicatory framework below." *Williams*, 136 S. Ct. at 1910.

Judge Elliot received the parties' briefs; presided over an adversarial hearing; ruled on motions; admitted, excluded, and evaluated evidence; and issued two initial decisions, in which he made conclusions of law

and findings of fact. The Commission even remanded the case to him to make additional factual findings because its own "'review of the record [could] not replace [Judge Elliot's] personal experience with the witnesses.'" Pet. App. 241a (citation omitted). Because Judge Elliot was not entitled to exercise such authority, *all* of his actions are null and void. Anything less would deny Lucia "all the possibility for relief" from a constitutionally appointed Officer, *Ryder*, 515 U.S. at 187, because a different and neutral adjudicator could well have reached—or might in the future reach—a contrary conclusion as to both liability and sanctions than Judge Elliot did.

Just as an adjudicator disqualified by pecuniary interest could not retry a case after divesting himself of that interest, an ALJ who has held office in derogation of the Constitution cannot thereafter sit in judgment of the same proceeding, even if he later receives a proper appointment. Accordingly, Judge Elliot is disqualified from presiding over any remand proceedings involving Lucia. Indeed, it is doubtful whether *any* SEC ALJ could preside neutrally over such proceedings given Lucia's challenge to their authority to hold office. Due process requires "[a] fair trial in a fair tribunal," *In re Murchison*, 349 U.S. 133, 136 (1955), in "administrative agencies which adjudicate as well as [in] courts," *Withrow* v. *Larkin*, 421 U.S. 35, 46 (1975). The Commission could avoid these problems by bringing any remand action in an Article III court.

The Commission's review of Judge Elliot's initial decisions has no bearing on the remedy the Constitution itself requires for an Appointments Clause violation. Because Judge Elliot did not constitutionally hold office when he presided over the administrative

proceeding, there was (and is) *nothing* for the Commission to "review." The Commission could have presided over this administrative proceeding itself in the first instance, *see* 5 U.S.C. § 556(b)(1), 17 C.F.R. § 201.110, but having chosen to delegate the proceeding to an unconstitutional adjudicator, the Commission must accept the consequences of its own decision. That means that, at minimum, everything following the entry of the order instituting proceedings must be vacated, and the case remanded for an entirely new proceeding before a constitutional adjudicator.

Of course, the remedial order in this case could also have implications for other cases in which an Appointments Clause objection has been raised. To our knowledge there are only thirteen such cases pending in federal appellate courts on petitions for review of SEC enforcement actions:

- *SEC* v. *Bandimere*, No. 17-475 (S. Ct.);
- *Gonnella* v. *SEC*, No. 16-3433 (2d Cir.);
- *Bennett* v. *SEC*, No. 16-3827 (8th Cir.);
- *Aesoph* v. *SEC*, No. 16-3830 (8th Cir.);
- *Feathers* v. *SEC*, No. 15-70102 (9th Cir.);
- *Cooper* v. *SEC*, No. 15-73193 (9th Cir.);
- *J.S. Oliver Cap. Mgm't* v. *SEC*, No. 16-72703 (9th Cir.);
- *Malouf* v. *SEC*, No. 16-9546 (10th Cir.);
- *Timbervest, LLC* v. *SEC*, No. 15-1416 (D.C. Cir.);
- *Young* v. *SEC*, No. 16-1149 (D.C. Cir.);
- *Riad* v. *SEC*, No. 16-1275 (D.C. Cir.);

- *Robare Grp., Ltd.* v. *SEC*, No. 16-1453 (D.C. Cir.); and
- *Harding Advisory LLC* v. *SEC*, No. 17-1070 (D.C. Cir.).

The Commission has already asked the courts in most, if not all, of these cases to hold them in abeyance pending the Court's ruling in this case. *See, e.g.*, Order, *Timbervest, LLC* v. *SEC*, No. 15-1416 (D.C. Cir. Aug. 8, 2017). And the constitutional objections in those cases have already put the Commission "on notice of the accumulating risk of wholesale reversals being incurred by its persistence." *L.A. Tucker Truck Lines*, 344 U.S. at 37. If the Commission must start over in a baker's dozen other proceedings, the sky will not fall.

B. Dismissal Is Warranted

The remedy for a structural error must be "appropriate to the violation." *Waller* v. *Georgia*, 467 U.S. 39, 50 (1984). While ordinarily a new proceeding before a constitutional Officer could be an appropriate remedy for the Commission's longstanding failure to appoint its ALJs in a constitutional manner, an order recently entered by the Commission indicates that stronger medicine is needed in Lucia's case.

One day after the Solicitor General confessed error by acknowledging that SEC ALJs are Officers under the Appointments Clause, the Commission—which pointedly did not sign the Solicitor General's certiorari-stage brief—entered an order purporting to "put to rest" the constitutional issue. *See* Order, *In re Pending Administrative Proceedings*, Securities Act Release No. 10,440, at 1 (Nov. 30, 2017) ("Ratification Order"). The Commission ostensibly "ratifie[d] the agency's prior appointment" of its five ALJs, and di-

rected them to "[r]econsider the record" in open enforcement proceedings to determine "whether to ratify or revise in any respect *all prior actions taken*." *Id.* at 1-2 (emphasis added). While the order by its terms is limited to actions still pending before the agency (and thus does not moot this case), *see* Cert. Reply 5-9, it is an important preview of how the Commission intends to treat Lucia and other victims of the unconstitutional regime here challenged.

The so-called Ratification Order shows that the Commission still considers the Appointments Clause a mere "matter of 'etiquette or protocol.'" *Edmond*, 520 U.S. at 659 (citation omitted). The Commission accepts neither the Clause's command (since the SEC still has not properly appointed its ALJs) nor the consequences of violating that command (as the SEC refuses to provide the new hearings required by the Constitution). The Ratification Order also previews that, unless this Court directs otherwise, the Commission intends to simply return *this* case to Judge Elliot and instruct him to "ratify" his previous work (as Judge Elliot has done thus far in virtually every other case). That would literally add insult to injury, and necessitate another trip up the appellate ladder for Mr. Lucia—who has already been mired in these unconstitutional proceedings for too much of his life.

To send a clear message that the Constitution actually means what it says, the Court should instruct the Commission to dismiss the order instituting proceedings in this case. Otherwise, the Court "will have awarded petitioners a remarkably hollow victory." *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 629 (2009).

1. To this day, there are no constitutionally appointed ALJs at the SEC. The Commission, as the

"Hea[d] of Departmen[t]" under the Appointments Clause, *could* appoint its ALJs. *See Free Enter. Fund*, 561 U.S. at 512-13 (quoting U.S. Const. art. II, § 2, cl. 2). An Officer's appointment requires a Commission vote, the administration of the oath of office, *see* U.S. Const. art. VI, cl. 3, and the signing and delivery of a commission, *see id.* art. II, § 3; *see also Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 157 (1803) (delivery of commission is "evidence of an appointment"). These constitutional prescriptions are not mundane "wall ornament[s]"; rather, they ensure "accountability" by "identify[ing] the source" of an appointment and "confirm" that "[t]hose who exercise the power of Government are set apart from ordinary citizens. Because they exercise greater power, they are subject to special restraints." *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1234-35 (Alito, J., concurring). Agencies, officials, and the public at large should know—and be able to ascertain—who are Officers.

To our knowledge, the Commission has done none of these things, other than (presumably) vote to "ratif[y] the agency's prior appointment." Ratification Order 1. That phrase, however, is constitutionally nonsensical. There was no "prior appointment" to ratify—the ALJs were not appointed by the agency, but rather were "hired" by the Chief ALJ, U.S. Cert. Br. 3. The Chief ALJ's previous "hiring" of ALJs was the constitutional equivalent of her "hiring" a new Chief Justice of the United States—that is to say, it was a nullity. Because that "hiring" did not satisfy the Appointments Clause, as the government now admits, the "ratification" of that same "hiring" cannot satisfy the Appointments Clause. The "ratification" of a nullity is itself a nullity.

This result follows directly from the "principles of agency law" that presumptively govern ratification. *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). Ratification operates only to grant retroactive effect to an unauthorized act "as though authority to do the act *had been previously given*." *Cook* v. *Tullis*, 85 U.S. 332, 338 (1874) (emphasis added). Although a principal can ratify "a prior act ... which was done ... on his account" but without his authorization, Restatement (Second) of Agency § 82 (Am. Law Inst. 2017), a principal cannot ratify an act that would have been invalid even *with* his authorization, *see id.* § 86; *see also* 2A William M. Fletcher, *Encyclopedia of the Law of Corporations*, § 764 (2017) ("A void act cannot be validated by subsequent ratification"). Put differently, "[r]atification serves to authorize that which was unauthorized. Ratification cannot, however, give legal significance to an act which was a nullity from the start." *Newman* v. *Schiff*, 778 F.2d 460, 467 (8th Cir. 1985).

The Commission cannot retroactively "ratify" a hiring process that would have been invalid even if the Commission had originally authorized it. *See NRA Political Victory Fund*, 513 U.S. at 98-99. It is not as if the Chief ALJ could have "hired" or even "appointed" other ALJs, but simply lacked the Commission's say-so. *See, e.g.*, *Dep't Clerks-Delegation of Power*, 21 Op. Att'y Gen. 355, 356 (1896) ("The power to appoint ... can not be delegated"); *see also Freytag*, 501 U.S. at 878 (Clause adopted to prevent "diffusion of the appointment power"). Rather, because SEC ALJs are Officers, the Appointments Clause required *the Commission*, as "Hea[d] of Departmen[t]," to appoint them. U.S. Const. art. II, § 2, cl. 2. The government has admitted that never happened; therefore, as of today, there are *no* constitutionally appointed SEC

ALJs—and there will be none unless and until the Commission obeys the Constitution.

2. Even if the Commission were in the future to appoint its ALJs as required by the Constitution, it could not use "ratification" to salvage proceedings presided over by ALJs at a time they were not constitutionally appointed.

a. The Commission has forfeited any ability to invoke ratification in Lucia's particular case. As Lucia argued below, "the Enforcement Division did not argue before the Commission, and the Commission did not argue before the panel," or the en banc D.C. Circuit, "that the structural constitutional error in the improper appointment of its ALJ can be overlooked or excused under harmless-error, *ratification*, *de facto*-officer, or any similar doctrines." Lucia En Banc C.A.D.C. Br. 17 n.2 (emphasis added). The Commission did not contend otherwise in the court of appeals; on the contrary, the panel opinion expressly noted that "the government d[id] not argue harmless error would apply." Pet. App. 9a.

As Lucia explained in his petition (at 34), the Commission could not raise any ratification argument in this Court, *see SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943), and the government did not dispute that proposition at the certiorari stage. And because the Court-appointed *amicus* stands in the Commission's shoes, *see Greenlaw* v. *United States*, 554 U.S. 237, 250 & n.5 (2008), he may not raise any such argument either. Nor could the Commission use "ratification" to achieve the same result on any remand—the knowing forfeiture of that doctrine here precludes reliance on it in this case, even if, *dubitante*, it might be available in some other case.

b. More generally, "ratification" is unavailable in proceedings presided over by an unconstitutional official because parties to those proceedings are entitled to not only a *decision* from an Officer, but also *the process* of presenting their case from start to finish before an Officer. Plainly, "review" by a newly appointed Officer of actions already undertaken by that same official, or even another, does not give administrative respondents "all the possibility for relief" they would receive in an entirely new proceeding. *Ryder*, 515 U.S. at 187.

Persons accused of wrongdoing in SEC administrative proceedings are entitled to the procedural protections of sections 556 and 557 of the APA, including the presence of a lawfully appointed adjudicator at all stages of the proceeding. 5 U.S.C. § 556(b). If the Commission's human resources director or window washer oversaw an administrative proceeding, it would be absurd to suppose that an ALJ (or even the Commission itself) could pick up mid-stream, "ratify" the previous procedural and substantive choices made, and issue a valid decision on the merits. Yet that is essentially equivalent to the process contemplated by the Ratification Order.

The APA's requirements on this point reflect common-sense principles that apply equally outside the confines of administrative law. A judge who accepts a bribe to favor one party at trial cannot cure the violation by giving the money back and "ratifying" his decision. A verdict returned by an unsworn jury cannot be "ratified" after the fact by swearing in the jury and asking the foreperson to say "guilty" once more. And a judge who has occupied his seat and made myriad decisions absent the constitutionally prescribed mechanism for ensuring political accountability cannot,

once properly appointed, simply sign off on his old work. In all these cases, to permit 'ratification' would be to "confe[r] validity" upon the acts of an unconstitutional actor in violation of this Court's teachings. *Ryder*, 515 U.S. at 180.

The Commission's Ratification Order makes no attempt to square its commands with *Ryder*, *L.A. Tucker Truck Lines*, or any other of this Court's precedents concerning the consequences of an Appointments Clause violation. On the contrary, the Commission has told this Court and all the world how it plans to use the ratification doctrine to achieve, *mutatis mutandis*, precisely what this Court has already foreclosed under the *de facto* officer doctrine. *Ryder*, 515 U.S. at 179. This Court's precedents cannot be avoided so easily.

The Enforcement Division has thus far cited only one lower-court decision that even arguably suggests that an unconstitutional adjudicator's decision may be ratified. *See Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015). *Intercollegiate* is inapposite, as the Copyright Royalty Board does not adjudicate adversarial enforcement proceedings; the case is also both wrong and readily distinguishable.

In *Intercollegiate*, the D.C. Circuit held that review of the paper record assembled by an adjudicator serving in violation of the Appointments Clause can take the place of a new hearing, at least where "a properly appointed official has the power to conduct an independent evaluation of the merits and does so." 796 F.3d at 117. But the court did not even consider the established principle that the participation of an improper adjudicator renders the entire proceeding—

not just the ultimate decision—a nullity. *See Williams*, 136 S. Ct. at 1910; *see also L.A. Tucker Truck Lines*, 344 U.S. at 38. A *new* hearing is required because there *is* no record to "ratify"; whether the adjudicator was a window washer or an ALJ, the adjudicator's actions in shaping the record were a nullity. The D.C. Circuit's contrary conclusion is just plain wrong.

In any event, *Intercollegiate* is distinguishable because it held that the requirements for a new hearing on remand were "governed by ... the procedures set forth in the Copyright Act." 796 F.3d at 125. Whereas those requirements may permit "a papers-only proceeding," *id.* at 126; *see* 15 U.S.C. § 803(b)(5), the APA requires a constitutionally appointed officer "at the taking of evidence," 5 U.S.C. § 556(b). No "ratification" process can change that the adjudicator who "took" the evidence here was not, in fact, constitutionally appointed.

The Commission cannot sweep under the rug the constitutional violation that—the government now admits—occurred in this case. Whether the Commission calls it "ratification," or *de facto* officer, or harmless error, or anything else, the concept of "no harm, no foul" simply does not apply to such structural violations. Lucia was entitled to a proceeding before a constitutional Officer; and no such proceeding has been held in this case.

3. The Ratification Order makes clear that unless this Court imposes real, concrete consequences for the Commission's violations, the Commission does not intend to provide Lucia the constitutional minimum remedy to which he is entitled. The Court needs to make clear that the Commission cannot relegate a

"significant structural safeguar[d] of the constitutional scheme," *Edmond*, 520 U.S. at 659, to a mere footnote.

An appropriate response to the Commission's intransigence would be to order the Commission to dismiss the order instituting proceedings against Lucia. Lucia properly raised the Appointments Clause objection before the Commission; he has litigated it before a three-judge panel of the D.C. Circuit as well as the ten-judge en banc court; and he has now brought it to this Court for final disposition. At significant personal, financial, emotional, physical, and familial expense—and all the while subject to the Commission's bar order—Lucia has fought the good fight. *See generally* Ben Stein, *Now for a Few Words about the Rule of Law*, Am. Spectator (Feb. 13, 2018), http://bit.ly/2BqvklM. He should be rewarded with something more for his efforts than a decision in the U.S. Reports with his name on it.

The Court has already recognized that the remedy for an Appointments Clause violation should provide an appropriate incentive for litigants to maintain structural constitutional challenges, and disincentive for the government to resist them. *See Ryder*, 515 U.S. at 182-83, 186; *Freytag*, 501 U.S. at 879-80. In the context of this case, that means dismissal of the Commission's case against Lucia in its entirety. Dismissal would be especially appropriate here because there undisputedly were no investor losses, no misappropriated funds, and no customer complaints, *see* Pet. App. 101a, 129a, and thus letting Lucia have his life back would benefit him and his family to the detriment of no one.

* * *

The Commission's unconstitutional enforcement regime has inflicted devastating consequences on Ray Lucia. After an unblemished career spanning forty years, Mr. Lucia found himself in an SEC administrative proceeding with flimsy procedural protections and an adjudicator accountable to nobody. He now finds himself nearly bankrupt, exiled from his lifelong profession, legally precluded from working with his own son, and falsely branded a fraudster. His good name and reputation have already been tarnished by a federal official who had no constitutional authority to render such a life-altering decision. If the Commission has its way, these unconstitutional acts will dog Ray and his family indefinitely.

The Framers designed the Appointments Clause to prevent such abuses of power by unaccountable officials. This Court should make clear not only that the Appointments Clause was violated here, but that such a violation carries meaningful consequence.

CONCLUSION

The judgment of the court of appeals should be reversed and remanded with instructions to dismiss the order instituting proceedings or, in the alternative, for entirely new proceedings in a constitutional tribunal.

Respectfully submitted.

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